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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GUARDIAN NEWS, INC. and SELIM
ZHERKA,

Plaintiffs,

-against-

PHILIP AMICONE, individually,
EDMUND HARTNETT, individually,
JOHN A. LISZEWSKI, individually,
CITY OF YONKERS, New York,
PAUL WOOD, individually, POLICE
OFFICERS JOHN DOE'S #1 to # 20,
Individually, and SANITATION WORKERS
#1 to # 20,

Defendants.

ECF Case

07 Civ. 07078 (CLB)

**AFFIDAVIT OF KEVIN J.
PLUNKETT IN OPPOSITION
TO PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION**

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

KEVIN J. PLUNKETT, being duly sworn, states the following under penalty of perjury:

1. I am a partner with the law firm Thacher Proffitt & Wood LLP, attorneys for Defendants in the above-entitled action, and duly admitted to practice law in this Court.

2. I submit this affirmation based upon information and belief, the source of which is a review of the documents that form the basis of this action.

3. I submit this affirmation to provide certain background information regarding this lawsuit.

4. On or about May 14, 2007, Plaintiff The Guardian News, Inc. (the “Guardian”) filed a lawsuit in this Court alleging that Yonkers City Code § 43-43 was unconstitutional because it completely bans the placement of newsracks on public property in the City of Yonkers (the “City”). A copy of the Summons and Complaint (07 Civ. 3802) in that action is annexed hereto as Exhibit A (the “First Action”).

5. On or about May 24, 2007, the Yonkers Corporation Counsel sent a fax to the Guardian’s counsel informing him that the City permits the placement of newsracks pursuant to other provisions of the Yonkers City Code and requesting that the First Action be withdrawn. A copy of the Corporation Counsel’s fax to the Guardian’s counsel is annexed hereto as Exhibit B.¹

6. The Guardian subsequently voluntarily withdrew the First Action.

7. Thereafter, as set forth in the accompanying affidavits of Deputy Police Chief Charles Gardner and Commissioner of Public Works John Liszewski (collectively, the “Affidavits”) and, upon information and belief, in an apparent orchestrated attempt to file another lawsuit against the City, the Guardian: (i) placed newsracks on City property blocking the rights of way of pedestrians; and (ii) distributed newspapers in the City in violation of provisions of the Yonkers City Code.

8. The City removed certain Guardian newsrack boxes that were blocking the right of way and issued summonses for violations of the Yonkers City Code. All but three of the newsrack boxes have been returned to the Guardian. The three newsrack boxes not returned to date are being held by the Yonkers Police Department for safekeeping and for evidence in pending City Court cases. See Affidavit of First Deputy Police Chief Charles Gardner sworn to

¹ This fax was preceded by a telephone call from the Yonkers Corporation Counsel to the Guardian’s counsel.

on September 20, 2007 at ¶ 9. They can be picked up by an employee of the Guardian upon the submission of proper identification. See id. at ¶ 10.

9. It is interesting how Plaintiff Selim Zherka, acted completely different when dealing with the Yonkers Public Library (a separate legal entity from the City).

10. Similar to its actions with the City, in July 2007, the Guardian placed newsrack boxes in various branches of the Yonkers Public Library.

11. On or about July 27, 2007, the Yonkers Public Library informed the Guardian, inter alia, that newsrack boxes were not permitted in branches of the Yonkers Public Library, but the Guardian could distribute newspapers in library branches in the same way as all other newspapers. A copy of the July 27, 2007 letter from the Yonkers Public Library to Mr. Zherka (Guardian Publisher) is annexed hereto as Exhibit C.


12. As requested, Mr. Zherka, unlike his dealings at City Hall, had his employees remove the newsrack boxes from the library branches and leave newspapers to be distributed similar to all other newspapers.

13. All the City asks is that Plaintiffs comply with City laws. The City does not wish to inhibit anyone's right to speak or disseminate its message. However, the City laws must be complied with by everyone and every entity.



Kevin J. Plunkett

Sworn to this 19th day of
September, 2007



Notary Public

STEFANIE A. BASHARI
NOTARY PUBLIC, State of New York
No. 01BA5069723
Qualified in Westchester County
Commission Expires December 2, 2010